IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000681
First-tier Tribunal No:
HU/57005/2023
LH/00280/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 September 2024

Before

UPPER TRIBUNAL JUDGE MEAH

Between

DHAN PRASAD RAI
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel
For the Respondent: Ms S Cunha, Senior Presenting Officer

Heard at Field House on 19 September 2024

DECISION AND REASONS

Introduction and Background

1. This is the substantive remaking decision of the appellant's appeal against the respondent's decision to refuse him entry clearance as the dependent of his father.

2. The appellant is a national of Nepal. His date of birth is stated to be 26 February 1973. He appeals against the Entry Clearance Officer's (ECO's) decision to refuse him entry clearance as the overage dependent son of Mr Man Bahadur Rai, the appellant's father and main sponsor. Mr Man Bahadur Rai served as a Gurkha in the British Army for just over 8 years ending his service in June 1969. He entered the UK for settlement in 2016, and his wife/the appellant's step-mother joined him to settle on the same occasion. They have resided/been settled here ever since.

3. The appellant's application was refused on the grounds that the respondent was not satisfied that he was either emotionally or financially dependent upon the sponsor. Details of the decision are set out extensively in the respondent's Reasons for Refusal letter (RFRL) issued to the appellant. This is a matter of record hence I shall not repeat it here.

4. In summary, the basis of the refusal was that the appellant did not satisfy the requirements of the respondent's policy covering the entry of adult children of former Gurkhas. It was also stated that he was/is not wholly financially or emotionally dependent on the sponsor.

5. In relation to Article 8 ECHR, the respondent stated this was not engaged as the appellant had grown up in Nepal and the main sponsor had chosen to apply for a settlement visa at a time when he had already reached adulthood. It was stated that the appellant had not shown family life with the main sponsor or that he had demonstrated real, committed or effective support from him. It was further stated that the decision to refuse the appellant entry was justified and proportionate in order to protect the rights and freedoms of others and the economic wellbeing of the country.

First-tier Tribunal

6. The appellant's appeal came before First-tier Tribunal Judge N Malik sitting in the Virtual Region on 18 January 2024. In a decision promulgated on 20 January 2024, Judge N Malik dismissed the appeal. The appellant sought permission to appeal to the Upper Tribunal and permission was granted by First-tier Tribunal Judge Connal as follows:

> "1. The application is in time (Rule 33(3) and Rule 11(2) applied).
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> 2. In summary, the grounds assert that the Judge erred by making an arguable mistake of fact in her consideration of financial support and/or an arguably flawed approach to the assessment of financial support under Article 8(1). In particular, it is submitted that the Judge erred when finding, at [13(e)], that: (i) the evidence of money remittances to the Appellant was limited to one payment in May 2022 of £78.80 and six payments in 2023 totalling £1,025.34, (ii) the evidence indicated that the monies were sent around the date of application and thereafter, (iii) the sums remitted were relatively modest, and (iv) it was common for those settling in the UK to send money to family members overseas.
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> 3. In the decision, at [13], the Judge set out numerous reasons for the finding that there was not real, effective or committed support to establish Article 8 family life. One of those reasons related to the issue of financial dependence. This included, at [13(e)], a finding that the evidence of money remittances to the appellant was "…limited to one payment in May 2022 of £78.80 and six payments in 2023 totalling £1,025.34". I note that the remittances, said in the grounds to have been omitted from consideration, appear to be poor copies, but that this issue was not raised in the decision. In light of the finding quoted above, and in an otherwise very careful and considered decision, it is at least arguable that the Judge omitted from her consideration and/or incorrectly totalled all of the remittances at Item 21 of the Appellant's bundle, and that such error was material to the finding that Article 8(1) was not engaged.
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> 4. The grounds disclose an arguable material error of law. Permission to appeal is therefore granted."

Upper Tribunal: Error of Law

7. Following the grant of permission, the matter came before Deputy Upper Tribunal Judge (DUTJ) Farrelly on 03 July 2024. The respondent's representative at that hearing accepted that a material error of law had been established which rendered it unsafe. It was found that Judge N Malik had factually erred in dealing with the evidence relating to financial dependency. Judge Farrelly's findings were as follows:

> "1. The appellant is a Nepalese national ,born on 26 February 1973. On February 2023 he applied for entry clearance with a view to settlement as the child of a former Gurkha, discharged before 1997.He indicated that he was unmarried and currently unemployed.
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> 2. His application was refused on 6 February 2023.His appeal was heard by FT Tribunal Judge Malik on 18 January 2024. It was accepted by his representative at hearing that he could not satisfy the requirements of the immigration rules. The appeal was based upon his article 8 right to family life with his parents and siblings who were here.
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> 3. The judge dealt with the issue of the appellant's circumstances and the notion of dependency. His parents had relocated to the United Kingdom along with most of his siblings in 2016. The judge noted that the appellant had worked in Saudi Arabia from 1998 to 2007, 2009 to 2014 and then from 2014 to 2018. He then worked in Romania from 2019 to 2022.
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> 4. The judge noted that the appellant had left the family home in 1998 when he was 25 years of age, 18 years before the sponsor came to the United Kingdom. The judge commented that had the purpose of is going to Saudi Arabia been to support his family there was no reasonable explanation as to why he continued to work there a further two years after they came to the United Kingdom. He had relocated to rented accommodation in Kathmandu. The judge said there was no evidence to show family life has endured. The judge concluded he had been leading an independent life before his family came to the United Kingdom and continue to do so.
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> 5. At paragraph 13e of his determination the judge dealt with the question of financial assistance from his father, his sponsor. The judge concluded this did not show he was genuinely dependent upon him. There was evidence of remittances via another son in the United Kingdom, but the judge said this was limited to one payment in May 2022 of £78.80 and six payments in 2023, totalling £1025.34. The judge viewed the remittances as modest and commented that it was common for individuals settling in the United Kingdom to send money to family members overseas.
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> 6. The judge concluded he had not shown real, effective or committed support so as to establish family life within the meaning of article 8.The judge found that he was a 50-year-old man who had been effectively living separate from his parents since 1998 and concluded he had established an independent life and that this

could continue. The judge found that being unmarried in this context did not create a dependency.

Permission to appeal to the Upper Tribunal.

7. Permission to appeal to the Upper Tribunal was granted by FTT Judge L C Connal. This was on the basis that it was arguable the judge failed to consider all the evidence of financial support. The application for permission to appeal referred to paragraph 13e of the Determination and suggest a factual error as to the level of financial support. It was contended therefore that FTT Judge Malik was factually wrong in stating there were only seven remittances. In granting permission FTT Judge L C Connal stated that the appeal model contained poor quality copies of the remittances and found it was arguable the judge missed or incorrectly totalled all the remittances, said to in fact to consist of thirteen remittances, including seven sent in 2022, predating the application.

At hearing

8. Ms A Everett, Senior HOPO acknowledged that FTT Judge Malik appeared to have overlooked some of the remittances contained in the appeal bundle. She accepted that given be extent of the omissions this was a significant error. One of the factors in considering dependency related to finances and this failure rendered the decision on safe. She made the point that dependency can restart, notwithstanding the appellant's absences abroad. Consequently, she accepted a material error of law and suggested that the appeal of be retained in the Upper Tribunal for remaking but had no firm views on the forum. The appellant's representative submitted that a rehearing was required.

Conclusions.

9. The presenting officer has accepted that it has been established there was a material error of law in the determination which has rendered it unsafe. Specifically, the judge factually erred in dealing with the evidence relating to financial dependency.

10. Given the uncontested facts and the limited nature of the areas in dispute the appeal can be retained in the Upper Tribunal for disposal.

Directions

11. The decision of the First-tier Tribunal Malik involved the making of a material error on a point of law and is set aside. The appeal is to be reheard in the Upper Tribunal. The following has not been disputed and are preserved:

(i) That the appellant does not meet the terms of the immigration rules and that the appeal relates to his article 8 rights in relation to his family in the United Kingdom.

(ii) The date of appellant's absences from Nepal.

(iii) That he is unmarried and living in rented accommodation in Kathmandu.

(iv) That he is currently unemployed.

(v) That his parents have been settled in the United Kingdom since 2016 as are most of his siblings.

(vi) His father sends remittances.

(vii) His representatives are to prepare a tabulation of the remittances. They should indicate when they were sent and the amounts and to whom. The tabulation should be cross-referenced to clear copies of proofs of the remittances. The evidence can be updated, as necessary.

(viii) The appellant's representatives are to advise listing if they intend calling any witnesses for which a Nepalese interpreter will be required."

Documents

8. I had before me a composite bundle which included the bundles relied upon by the parties in the First-tier Tribunal.

Upper Tribunal: Remaking Hearing

9. The sponsor and his son by the name of Mr Saroj Rai, appeared before me. They both spoke through an official Nepalese speaking court interpreter. I took time at the outset to explain the procedure and format of the hearing to them. They both adopted their witness statements that were before the First-tier Tribunal. They then answered questions from both representatives after which I heard submissions from each party.

10. I have taken all of this into account in my consideration of this remaking appeal. I shall not repeat all of this here as it is all duly noted in the record of proceedings.

Analysis and Conclusions

11. The issue in contention is a relatively narrow one given the preserved findings by Judge Farrelly. This included that the sponsor sent remittances to the appellant. There is no reason for me to go behind any of the preserved findings. It is accepted that the appellant does not satisfy the requirements of the Immigration Rules and his case is one that falls to be considered under Article 8 ECHR.

12. I have therefore considered in this regard the authority in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60** having regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39-53, whereby I also adopt the balance sheet approach recommended by Lord Thomas at paragraph 83, alongside the guidance given in **R (Agyarko and Ikuga) v SSHD [2017] UKSC 11** at paragraphs 49-57, together with that which is also stated more recently in **TZ & PG [2018] EWCA Civ 1109** at paragraphs 30-31 (although I understand that these cases related to leave to remain, rather than entry clearance). I have therefore also noted that which **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)**.

13. Accordingly, in relation to my consideration of the appellants' appeal under this heading, I adopt the approach to appeals on grounds of Article 8 in accordance

with jurisprudence which comes from Strasbourg and from **Huang v Secretary of State for the Home Department [2007] UKHL 11** and subsequent judgments, which were summarised at paragraphs 7-12 of **EB (Kosovo) v SSHD [2008] UKHL 41**.

14. This requires an assessment as to whether the appellant and the sponsor have established a family life and given the circumstances, would the refusal to grant them entry constitute an interference of such gravity that it would engage the United Kingdom's obligations under Article 8 of the European Convention to respect any claimed family life, and if so, is such interference in accordance with the law? If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? If so, is such interference proportionate to the legitimate public end sought to be achieved? **Razgar [2004] UKHL 27**.

15. Given the nature of the matter I have also further considered the authorities in **R (Gurung) v SSHD [2013] 1 WLR 2546** at paragraphs 40, 41 and 42, **Ghising and Others (Ghurkha/BOC's historic wrong; weight) [2013] UKUT 00567 (IAC)** and more recently at paragraph 36 of **Rai v ECO New Delhi [2017] EWCA Civ 320**.

16. Accordingly, thirteen money transfer receipts were provided in the support of the appeal before the First-tier contained at 66-78 of the appellant's bundle before the First-tier tribunal. These were for the years 2022 and 2023. Further receipts were provided for this appeal at the Upper Tribunal for 2023 and 2024. It was the appellant's case, and the evidence of the sponsor before me, that he was sending at least £50.00-£100.00 to appellant each month. Ms Revill argued that the amounts showing in the money transfer receipts reflected this which therefore demonstrated real, effective and committed support.

17. Court of Appeal ruled in the cases of **Rai** and **Kugathas [2003] EWCA Civ 31**, that family life requires real, committed and effective support. There is no presumption of this between adult children and their parents and that more than normal emotional ties are required to show Article 8 ECHR family life, relying upon the Upper Tribunal case of **Ghising**, which notes that family life had been too restrictively interpreted and that there was no need for evidence of exceptional dependency.

18. This is a case in which, absent the 'historic injustice', the evidence before me is that the appellant would have applied to come to the UK with his father as a child. This is something he explains in his witness statement. I find, therefore, that the move to settle in the UK by the main sponsor in 2016, was in no way indicative of an intention that family life should or did end between them and the appellant he and other family members came to reside here. I am satisfied that the overall evidence placed before me (which was also before the First-tier Tribunal), is strongly indicative that the appellant has been dependent on his father for most of his life from the time of his birth until the present date, and that he has been both emotionally and financially dependent upon the sponsor for the majority of, if not for all of his lifetime.

19. I noted the evidence that the appellant has worked before in Saudi Arabia, and more recently in Romania where he travelled to find work in an effort to support

himself. However, this was a failed attempt and sponsor told the appellant to return to Nepal from Romania when the appellant again became dependent upon the sponsor. I accept that it was likely that there was no significant financial support whilst the appellant worked in Saudi Arabia where the sponsor appeared to indicate that the appellant was self-sufficient during this time. However, I also accept that family life was ongoing during this period and was not broken simply because the appellant was able to support himself financially during his time in Saudi Arabia. However I also accept that the emotional connection between the appellant and the sponsor remained intact during this period.

20. What is also clear from the evidence, including the written testimonies of the appellant and the witnesses who appeared before me is that the appellant has needed ongoing financial support from the sponsor in Nepal both before and after his trip to Romania, and I am satisfied based on the totality of the evidence that there is a family life in existence between the appellant and his sponsor that goes beyond the normal emotional ties that might usually exist between adult children and their parents. This is solidified by the ongoing financial support the appellant continues to receive from the sponsor which strongly represents real, committed and effective support akin to that envisaged in **Kugathas**.

21. It is also noteworthy that this appeal involves an 'historic injustice' and that where such an injustice is causative of the delay in an application for status that an appellant would already have, but for that injustice, the appellant should be put in the position he would have been in had it not occurred.

22. I find that when taking into account the fact that the appellant is dependent upon his sponsoring father, and has been so for most of his life, and he has continued until the present day, to be supported by the sponsor living from regular funds sent to him from the UK by the sponsor, are all sufficient factors to show the family life in existence here.

23. The fact that the appellant has not formed an independent life of his own, and the fact that he is not financially independent, I find are all very significant factors which are to be given due weight in the Article 8 ECHR balancing exercise. When all of these are taken together, alongside the undisputed 'historic injustice' element in this appeal, I find, are more than sufficient to tip the proportionality assessment in the appellant's favour.

24. Finally, in assessing the public interest under Article 8(2) ECHR, I have also kept in mind the provisions of section 117B of the NIAA 2002 as amended by section 19 of the Immigration Act 2014. I have in this regard taken note of the reported cases of **Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC), Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC), Dube (ss.117A-117D) [2015] UKUT 90 (IAC)**, **AM (s 117B) Malawi [2015] UKUT 0260 (IAC)** and **Rhuppiah v SSHD [2018] UKSC 58** , insofar as they are applicable in this appeal.

25. There are no precariousness of stay/leave issues here given that the matter is to do with an entry clearance application from overseas. It does not appear that the appellant will become a burden on the state when he arrives in the UK, as there is nothing before me to suggest that this will happen, and the sponsor said that he will continue to support the appellant from his own funds. It is also probable that the appellant will take up suitable employment in the UK upon arrival in the UK.

26. All the factors set out at section 117B are to do with maintaining effective immigration control. This must therefore be considered in the light of that which is stated at paragraph 60 of **Ghising** given the nature of the particular matter here, in that it involves a case of an historical wrong, where the following is stated:

> *"…But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour…"*

Notice of Decision

27. The appellant's appeal is allowed.

S Meah
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2024